UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
---X
A.W. & N.W., individually and on behalf of B.W., a student with a disability,

Plaintiffs,

v.

BOARD OF EDUCATION WALLKILL CENTRAL SCHOOL DISTRICT,

Defendant.
---X

COMPLAINT – STATUTORY APPEAL OF STATE REVIEW OFFICER DECISION

Civil Action No. 1:14-CV-1583 [DNH/RFT]

ECF Case

PRELIMINARY STATEMENT

1. Plaintiffs A.W. and N.W., individually and on behalf of their minor son, B.W., seek partial reversal of a decision rendered by the New York State Review Officer (the "SRO") on September 19, 2014, which denied them tuition reimbursement for B.W.'s placement at the Kildonan School ("Kildonan"), a private school in Amenia, New York, for the 2012-13 and 2013-14 school years, despite confirming the Independent Hearing Officer's (the "IHO's") holding that the Wallkill Central School District (the "District") failed to offer B.W. a free appropriate public education ("FAPE") for the 2011-12, 2012-13, and 2013-14 school years.

2. This action is authorized by the Individuals with Disabilities Education Improvement Act of 2004 (the "IDEA"), 20 U.S.C. § 1415(i)(2)(A), and Article 89 of the New York State Education Law (N.Y. Educ. Law §§ 4404(3)), Section 504 of the Rehabilitation Act ("§ 504"), 29 U.S.C. § 794(a), and Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, to review a final administrative decision of

the SRO regarding the provision of a FAPE to and unlawful discrimination against B.W., a student with a disability.

3. This action is timely commenced within four months after the date of the SRO decision, pursuant to 20 U.S.C. § 1415(i)(2)(B) and New York Education Law § 4404(3)(a).

JURISDICTION AND VENUE

4. The Court has subject matter jurisdiction over this action under the IDEA, 20 U.S.C. § 1415(i)(2)(A), § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), Title II of the ADA, 42 U.S.C. § 12132, and 28 U.S.C. § 1331, conferring jurisdiction in cases arising under the Constitution and laws of the United States, and 28 U.S.C. § 1343, conferring original jurisdiction on district courts to recover damages or secure equitable relief under any Act of Congress providing for the protection of civil rights.

5. The Court has supplemental jurisdiction to adjudicate New York state claims arising out of the same facts as the asserted federal claims. 28 U.S.C. § 1367.

6. Venue is proper in the Northern District of New York pursuant to 28 U.S.C. § 1391(b)(l) as the judicial district in which Defendant District has its principal offices.

7. Plaintiffs have exhausted their administrative remedies.

PARTIES

8. Plaintiffs A.W. and N.W. are the natural father and mother of B.W. They reside together in Wallkill, New York.

9. B.W. was born on [redacted], 1998 and is currently sixteen years old. He resides with his parents.

10. B.W.'s disability classification received from the District's Committee on Special Education ("CSE") is Other Health Impairment ("OHI").

11. At all times described herein and pursuant to all relevant statutes, B.W. was a student with a disability and entitled to receive special education and related services.

12. He has been diagnosed with language-based learning disabilities, specifically dyslexia, and Attention Deficit Hyperactivity Disorder ("ADHD"). The interaction of both disabilities has led to significant challenges for B.W. in processing information and writing skills, among other academic and behavioral deficits.

13. Defendant District is a public corporation as defined in Section 66 of the General Construction Law of the State of New York.

14. The District's principal offices are located at 19 Main Street, Wallkill, Ulster County, New York 12589.

15. The District is responsible under the IDEA and the New York State Education Law for providing a FAPE to District residents between the ages of three and twenty-one who have been classified or should be classified as children with disabilities in need of special education services.

16. B.W. is identified by his initials in the caption of this action and throughout the Complaint consistent with Federal Rule of Civil Procedure 5.2(a).

LEGAL FRAMEWORK OF THIS ACTION

17. The IDEA requires a Local Education Agency ("LEA") to provide FAPE to children with disabilities. 20 U.S.C. § 1412(a)(1)(A). A child is considered a "child with a disability" for purposes of the IDEA if he or she exhibits one or more of an

enumerated list of conditions – which include dyslexia and ADHD – and demonstrates a need for special education and related services. 20 U.S.C. § 1401(3)(A).

18. Under NY Ed Law 4401(a) "'a child with a disability' or 'student with a disability' means a person under the age of twenty-one who is entitled to attend public schools pursuant to section thirty-two hundred two of this chapter and who, because of mental, physical or emotional reasons can only receive appropriate educational opportunities from a program of special education."

19. Under the ADA, "the term 'disability' means, with respect to an individual-- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102.

20. Section 504 defines physical or mental impairment as "(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 34 C.F.R. §104(j)(2)(i).

21. Where parents believe the LEA has not offered their child FAPE, they may enroll their child unilaterally in a private school and seek reimbursement from the LEA. Parents who seek tuition reimbursement must satisfy the Supreme Court's "*Burlington/Carter*" test, which looks to: (1) whether the school district's proposed plan will provide the child with a FAPE; (2) whether the parents' private placement is

appropriate to the child's needs; and (3) a consideration of the equities. *See Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7 (1993); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985); 20 U.S.C. § 1412(a)(10)(C)(i), (ii).

22. To satisfy the "first prong" of *Burlington/Carter*, the school district bears the burden of proving that it timely provided FAPE to the student. A FAPE must include "special education and related services" tailored to meet the unique needs of a particular child, and be "reasonably calculated to enable the child to receive educational benefits." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982).

23. To satisfy the "second prong" of *Burlington/Carter*, parents must demonstrate that their unilateral private placement was appropriate. *See Gagliardo v. Arlington Cen. Sch. Dist.*, 489 F.3d 105, 112 (2d Cir. 2007) (citing *M.S. ex rel. S.S. v. Bd. of Educ.*, 231 F.3d 96, 104 (2d Cir. 2000)).

24. Whether a parental placement is appropriate turns on "whether a placement - public or private - is 'reasonably calculated to enable the child to receive educational benefits.'" *Frank G. v Bd. of Educ. of Hyde Park*, 459 F.3d at 364 (quoting *Rowley*, 458 U.S. at 207).

25. As the Second Circuit has noted:

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs.

Frank G., 459 F.3d at 364-65 (internal citations omitted).

26. "The test for the parents' private placement is that it is appropriate, and not that it is perfect." *R.E. v. New York City Dep't of Educ.*, 785 F. Supp. 2d 28, 44 (S.D.N.Y. 2011) (quoting *Frank G.*, 459 F.3d at 364). "[P]arents need not show that a private placement furnishes every special service necessary to maximize their child's potential." *Frank G.*, 459 F.3d at 365.

27. "[T]he standard applied to determine the appropriateness of parental placements is less restrictive and subject to fewer constraints than that applied to the school authorities." *C.B. v. N.Y.C. Dep't of Educ.*, No. 02 Civ. 4620 (CLP), 2005 U.S. Dist. LEXIS 15215, at *53-54 (E.D.N.Y. Jun. 10, 2005), and tuition reimbursement has been found appropriate even where the private school "fail[ed] to meet state education standards." *Carter*, 510 U.S. at 14.

28. A private placement that meets the standard of reasonably calculated to enable the child to receive educational benefits "is one that is 'likely to produce progress, not regression.'" *Gagliardo,* 489 F.3d at 112 (quoting *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998)).

29. An inquiry into the appropriateness of a private placement is thus a search for indicators that "the placement provides 'educational instruction specially designed to meet the unique needs of a [disabled] child, supported by such services as are necessary to permit the child to benefit from instruction.'" *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826 (2d Cir. 2014) (quoting *Frank G.*, 459 F.3d at 364-65).

30. A Parent's choice of school must not be evaluated based on hindsight:

> [T]his Court sees no reason why the parents' choice of a program should not be evaluated under the same standards, looking at the program at the time that the parents selected it and determining whether, at that point, it was a program reasonably calculated to provide the child with an

> educational benefit. Indeed, if the child's lack of progress under a particular IEP does not render the IEP inappropriate, the fact that the child may not have progressed under the parents' chosen program should not automatically mean that the program was inappropriate at the time the placement decision was made. If anything, it would be expected that the school authorities, with their many trained personnel, resources, and access to information, would be in a better position than the average parent in determining what an appropriate educational program would be for a child.

C.B. v. N.Y. Dep't of Educ., No. 02 CV 4620 (CLP), 2005 U.S. Dist. LEXIS 15215, *59-60 (S.D.N.Y. June 10, 2005) (citation omitted).

31. Last, *Burlington/Carter* requires a parent to show that equitable considerations, including parental cooperation, favor reimbursement.

32. The Supreme Court has held that section 1412(a)(10)(C)(ii) is "best read as elucidative rather than exhaustive" with respect to the tuition remedies available under the IDEA, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 242 (2009), and that the equitable power of courts under § 1415(i)(2)(C)(iii) is independent of, and broader than, the specific tuition reimbursement provision in the IDEA. *Id.* at 243. In *Burlington*, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA. 471 U.S. at 370-71. Reimbursement merely requires a district to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it offered the student a FAPE. *Burlington*, 471 U.S. at 370-71; 20 U.S.C. § 1412(a)(10)(C)(ii); 34 CFR 300.148.

33. Relying upon the analysis of *Forest Grove,* the Second Circuit recently affirmed that the IDEA authorizes awards not only of *reimbursement to parents* who have fronted the cost of private school tuition, but also *direct retroactive tuition payments to private schools* that advance parents all or part of the cost of tuition, so long as the

three prongs of the *Burlington/Carter* test are satisfied. *E.M. v. New York City Dep't of Educ.*, 758 F.3d 442 (2d Cir. 2014) (Parent had standing to seek direct tuition funding even where she herself had no obligation to repay the private school, but agreed to use her best efforts to obtain reimbursement for the school) (citing *Mr. & Mrs. A. ex rel. D.A. v. N.Y.C. Dep't of Educ.*, 769 F. Supp. 2d 403, 427 (S.D.N.Y. 2011) (awarding tuition reimbursement where the "parents lack the financial resources to 'front' the costs of private school tuition, and ... a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs."); *A.R. ex rel. F.P. v. N.Y.C. Dep't of Educ.*, No. 12 Civ. 4493, 2013 U.S. Dist. LEXIS 135855). *See also S.W. v. New York City Dep't of Educ.*, 646 F. Supp. 2d 346, 359-60 (S.D.N.Y.2009) (finding that a denial of a FAPE constituted an injury in fact which was redressable by direct retrospective payment); N.Y. SRO No. 12-152 (Gift from grandparent for tuition payment with no obligation to repay did not divest parents of standing to seek tuition reimbursement) (citing 20 U.S.C. §1401(23)(C); 34 CFR 300.30(a)(4); 8 NYCRR 200.1[ii][1]).

34. The Second Circuit has held with respect to review of state hearing officers' decisions:

> In conducting our *de novo* review of the district court's holding, we are mindful that the role of the federal courts in reviewing state educational decisions under the IDEA is "circumscribed." Although the district court must engage in an independent review of the administrative record and make a determination based on a "preponderance of the evidence," the Supreme Court has cautioned that such review "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." To the contrary, federal courts reviewing administrative decisions must give "due weight" to these proceedings, mindful that the judiciary generally "lack[s]

> the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy."

Gagliardo, 489 F.3d at 113 (citations omitted).

35. IDEA cases present mixed questions of law and fact, which generally "fall along a degree-of-deference continuum, ranging from non-deferential plenary review for law-dominated questions, to deferential review for fact-dominated questions." *Mr. I. ex rel. L.I. v. Me. Sch. Admin. Dist. No. 55*, 480 F.3d 1, 5 (1st Cir. 2007).

36. Where an SRO's decision is inadequately reasoned, however, "a better-reasoned IHO opinion may be considered instead. *See, e.g., Reyes v. New York City Dep't of Educ.*, 760 F.3d 211 (2d Cir. 2014); *C.L. v. Scarsdale Union Free Sch. Dist.*, 644 F.3d 826 (2d Cir. 2014); *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167 (2d Cir. 2012). *M.H. v. N.Y.C. Dep't of Educ.*, 685 F.3d 217, 246 (2d Cir. 2012); *C.F. ex rel. R.F. v. N.Y.C. Dep't of Educ.*, No. 11-5003-cv, 2014 U.S. App. LEXIS 4083 (2d Cir. Mar. 4, 2014); *M.H. v. N.Y.C. Dep't of Educ.*, 712 F. Supp. 2d 125 (S.D.N.Y. 2010).

37. IDEA § 1415(j) states, in pertinent part: "[D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child." Where a child's last agreed-to placement is a private school at public expense, the IDEA's Stay Put provision obligates a district to pay for the student's private school tuition for the duration of the proceedings, which include appeals to the United States District Court and Court of Appeals. *M.R. v. Ridley*, 744 F.3d 112 (3d Cir 2014) *cert. pending sub nom Ridley Sch. Dist. v. M.R.*, No. 13-1547 (U.S. 2014).

Factual Background

38. B.W. was in the District for his entire educational career prior to enrolling at Kildonan for the 2011-12 school year, B.W.'s eighth grade year.

39. B.W. first developed academic and behavioral problems in second grade. These problems continued into third grade, at which time his mother first wrote to the District outlining her concerns about B.W.'s reading and possible learning disability. Despite parents' concerns, the District did not conduct a functional behavioral assessment or implement a behavior plan pursuant to federal or state regulations, and B.W. progressed to fourth grade with continued difficulty with focus, behavior and academics.

40. These problems persisted into and through fifth grade. By the time B.W. entered the sixth grade, he was still not receiving remedial services. During sixth grade, there were a number of incidents involving his behavior and he received suspension-warning letters on several occasions.

41. Despite B.W.'s behavioral challenges and his need for individualized attention due to his unique learning style, B.W. was repeatedly placed in regular education classes with approximately 30 students.

42. B.W.'s parents sought help from the founder of Kildonan and expert in dyslexia, Ms. Diana Hanbury King. Ms. King is the Founding Fellow of the Academy of Orton-Gillingham Practitioners and Educators. On March 6, 2010, Ms. King diagnosed B.W. with dyslexia and opined that B.W. should be classified by the District's Committee on Special Education as Learning Disabled and instructed using an Orton-Gillingham-based, multi-sensory instructional program.

43. On March 15 and 16, 2010, the District's school psychologist, Donna Otto, conducted a psycho-educational evaluation of B.W. and acknowledged Ms. King's diagnosis of dyslexia. Dr. Otto's evaluation revealed that B.W.'s full scale IQ was 96, placing him at the 39th percentile. All of his composite scores were in the same range from 94-100. This placed him in the average range with no one composite being particularly strong or particularly deficient. All of his academic areas fell within the average range; however, in spelling he tested in the 13th percentile, below average.

44. On March 24, 2010, the District's speech/language therapist, Lisa Bender, conducted a speech/language evaluation on B.W. She found his speech/language levels to be normal and did not recommend further evaluation.

45. On May 19, 2010, at Parents' request, the CSE convened to determine B.W.'s eligibility for special education services. Despite the CSE noting on the Initial Eligibility Determination that B.W. has academic limitations and challenges with writing, the CSE deemed him ineligible for special education services.

46. During the summer of 2010, to compensate for the District's failure to provide B.W. with a FAPE, B.W.'s parents enrolled him in a summer academic program at Camp Dunnabeck at Kildonan. Camp Dunnabeck is a unique summer program that addresses reading, writing and spelling for children with dyslexia or other language-based learning disabilities.

47. Testing done at the conclusion of the summer at Camp Dunnabeck showed that B.W. made solid progress at the program, but still had progress to make.

48. On August 12, 2010, N.W. requested another CSE meeting to share and discuss the testing done at Camp Dunnabeck.

49. The District failed to respond before the start of the 2010-11 school year.

50. By letter dated November 10, 2010, Dr. Ingrid Dodard of the Mid-Hudson Medical Group, diagnosed B.W. with ADHD and prescribed him Concerta, a medication commonly prescribed for children with ADHD.

51. The Parents provided Dr. Dodard's letter to the District's CSE on November 16, 2010, when the CSE finally convened to again determine B.W.'s eligibility for special education and related services.

52. Once again, the CSE determined that B.W. was ineligible for special education services, acknowledging only a diagnosis of ADHD and disregarding the diagnosis of dyslexia by Ms. King.

53. Dr. Dodard then sent another letter to Parents on December 6, 2010 in which she outlined B.W.'s need for school accommodations and programming taking into account his dual diagnoses of dyslexia *and* ADHD.

54. On December 7, 2010, a meeting was held to determine again B.W.'s need for educational services and supports, at which time N.W. submitted Dr. Dodard's second letter to the District. However, B.W. was only given a § 504 plan, which called for superficial accommodations and modifications for B.W.'s difficulties with written assignments – not an IEP, nor any instruction specially designed to remediate dyslexia, such as an Orton-Gillingham-based program.

55. This despite the § 504 plan developed at this meeting noting that B.W. is dyslexic and despite the District's own report dated 12/7/2010 stating:

> [B.W.] struggles with written assignments and reading. He has been placed in the reading and writing lab and is being evaluated by the reading teacher. He is currently in an inclusion ELA class as a non-classified student, but is receiving support in that environment. He has trouble with

> writing and he is reluctant to read and write. He is going to private tutoring to help remediate his reading and writing skills, His parents have requested that teachers check to be sure that [B.W.] copies the correct homework assignment into his planner and that teachers keep in touch with them as to [B.W.'s] progress.

56. Instead of identifying B.W. as eligible for special education and providing him with an IEP inclusive of specialized instruction and goals and objectives tailored to meet his needs, the District instead placed B.W. in a reading and writing ("RAW") lab class, which provided services that *at best* resembled the provision of special education.

57. B.W.'s parents repeatedly expressed their concerns to the District regarding the inappropriateness of the § 504 plan and the District's failure to provide additional, appropriate instruction and needed supports. They asked repeatedly for an IEP that would address his learning deficits and each time were ignored.

58. They began to search for alternative placement options. Kildonan, which specializes in the education of students with dyslexia, fit B.W.'s needs, and the school accepted him for the 2011-12 school year on or about March 10, 2011.

59. Notwithstanding B.W.'s acceptance at Kildonan, Parents continued to work with the District to create an appropriate in-District placement.

60. On April 7, 2011, B.W.'s parents received a diagnostic report from Star Reading and reviewed it with the District. Star Reading found B.W. to be reading at a 6.3 grade level despite being near completion of 7th grade.

61. B.W.'s New York State testing scores consistently declined from 2008-09 to 2009-10 and from 2009-10 to 2010-11 in English Language Arts. His scores declined from performance level 3 to 2 and then from 2 to l. By the end of the 2011 school year, B.W. scored a 641, which is below proficient in Language Arts.

62. Additionally, B.W. failed math during the 2010-11 school year. Parents again asked the District to find ways to remediate his specific learning deficits; however, these requests were ignored.

63. At the start of the 2011-12 school year, B.W.'s spelling level was tested at a 5.0 grade level.

64. With seemingly no other options, Parents unilaterally placed B.W. at Kildonan for the fall of 2011. B.W. was placed as a boarding student both due to the specific tutoring and extra supports offered to boarding students, as well as the distance between the family home and the school.

65. On January 10, 2012, Dr. Dodard prepared a letter reiterating B.W.'s diagnosis of dyslexia and noting that since attending Kildonan, B.W.'s grades had improved. She then offered her professional opinion that B.W. must remain at Kildonan in order for him to make meaningful educational progress.

66. On March 9, 2012, N.W. requested another meeting to determine B.W.'s eligibility for special education services and again requested an IEP and additional testing from the District. She also requested that the District review B.W.'s report cards from Kildonan, as well as Dr. Dodard's report in which she diagnosed B.W. with dyslexia.

67. On March 15, 2012, the District's school psychologist Silvia Donates conducted a psychological evaluation on B.W. She found B.W. to have a full scale IQ of 99, which is average, and again found all of his composite scores to be within the average range.

68. On March 16, 2012, B.W. was tested by Colleen Kellner to assess his academic abilities. At this time most academic subjects were in the 7th to 8th grade

range; however, his scores showed that he was at a 4th grade level in writing and spelling.

69. On May 18, 2012, a CSE meeting was held to plan B.W.'s program for the 2012-13 school year, his first year in high school. This was the first CSE meeting in which he was given an IEP, purportedly based upon Kildonan's testing and records. The team recommended that B.W. be classified as OHI based upon his diagnosis of ADHD. The team completely ignored his dyslexia and other learning difficulties and recommended an in-District program at Wallkill High School.

70. The program recommended consisted of ICT classes, along with one session daily of resource room.

71. On June 6, 2012, N.W. sent an e-mail to the District informing them that she disagreed with the District's psychological evaluation dated March 15, 2012 and requested an Independent Educational Evaluation ("IEE") at public expense. Having heard nothing from the District regarding her request for an IEE, N.W. reiterated her request for an IEE on or about June 20, 2012.

72. In a letter dated August 29, 2012, the District finally responded by saying that they granted the Parent's request for an IEE, but at a rate far below the prevailing rate in the community. This unreasonable cap at a rate not reflective of the prevailing rates in the community prevented the parents from choosing among qualified providers in the field. However, although the District's response was tantamount to denying the parents' request, no due process hearing was commenced by the District to defend their school evaluation, as the IDEA requires.

73. At no time did the Parents receive an independent educational evaluation in the area of psychology.

74. On August 22, 2012, N.W. sent the District a letter stating that she rejected the May 18, 2012 IEP and that she intended for B.W. to remain at Kildonan as a boarding student for the 2012-2013 school year. She further requested that the District pay for tuition and boarding costs for the 2011-12 and 2012-13 school years.

75. Without any alternatives on the table, B.W. attended Kildonan again during the 2012-2013 school year. A CSE meeting was held on April 24, 2013 with a follow up program review on June 10, 2013, to discuss B.W.'s IEP for the 2013-14 school year. The team found, *based again upon reports and testing from Kildonan*, that B.W. presented with academic deficits and required special education services.

76. The CSE did not meaningfully discuss or consider B.W.'s dyslexia diagnosis once again, and the team again recommended an in-District program of ICT classes and resource room - this time with an additional reading class.

77. Parents again notified the District that they felt the recommendations were inappropriate and they were going to unilaterally place at Kildonan for the 2013-14 school year and seek reimbursement from the District for tuition, room and board.

Procedural Background

78. On September 24, 2013, Parents submitted a Request for an Impartial Hearing to the District (the "Due Process Complaint").

79. The Due Process Complaint alleged that the District had failed to provide a FAPE to B.W. during the 2011-12, 2012-13 and 2013-14 school years.

80. The denial of FAPE consisted of, *inter alia*, a Child Find violation, a failure to classify B.W.'s disabilities, a failure to develop appropriate IEPs, a failure to evaluate B.W. properly, a failure to respond to IEE requests in timely fashion, and a failure to conduct a functional behavioral assessment and implement an appropriate behavior intervention plan.

81. The Due Process Complaint sought 1) a determination that B.W. was denied a FAPE, that Kildonan was an appropriate unilateral placement for B.W., and that the equities weighed in the parents' favor, and 2) an order that the District reimburse Parents for the full cost of tuition and related expenses for B.W.'s attendance at Kildonan for the three years in question.

The IHO Hearing

82. On January 29, 2014, an impartial hearing began, which concluded on April 24, 2014, after six days of proceedings.

83. The District bore the burden of proving the "first prong" of the *Burlington/ Carter* test: whether it had offered FAPE to B.W. for the 2011-12, 2012-13 and 2013-14 school years.

84. By a decision dated June 20, 2014, the IHO found that the District failed to offer B.W. FAPE for the 2010-11, 2011-12, 2012-13 and 2013-14 school years. *See* IHO Findings of Fact and Decision, attached as **Exhibit A**. The District thus did not meet its burden under Prong I of the *Burlington/Carter* test.

85. With respect to Prong II of the *Burlington/Carter* test, the IHO found that Kildonan was an appropriate placement for B.W.

86. The IHO expressly found based on his review of Kildonan reports, and crediting Parents' witnesses, that B.W. made behavioral progress at Kildonan, finding: "[B.W.'s] behaviors have diminished in terms of frequency and intensity. I find that [B.W.] did make progress with the behaviors that impacted his learning." Ex. A at 72, 81.

87. The IHO noted that B.W.'s classroom behaviors had improved:

> It should also be noted that the student had progressed to a point where he was no longer being removed from class. The testimony was supported by the classroom observation in 2013 and on April 12th, 2013 the student engaged in some task avoidance but was quickly refocused and redirected that the teacher to the content at hand and the avoidance was initially in the commencement of start-up of the days instruction and lesson, which is progress from earlier where the student would be disruptive to his peers and others. It is also ironic that the district is critical of the student's lack of progress academically and behaviorally even though the district's CSE did not recommend a behavior intervention plan and that the district disputed the student's dyslexia and the student should not be classified as learning disabled because cognitively he was in the average range.
>
> IHO Op. at 75.

88. To the extent some of B.W.'s problem behaviors persisted, the IHO found that this was due to "years of baggage" following the District's failure to provide appropriate interventions.

89. The IHO also found that Kildonan properly addressed B.W.'s academic needs and that B.W. responded well to Kildonan's Orton-Gillingham-based interventions. B.W. made significant progress in all academic areas. IHO Op. at 81.

90. Moreover, B.W.'s academic and behavioral progress were interconnected: as he became less academically frustrated his behaviors steadily improved.

91. Thus, the IHO held that Parents satisfied Prong II of the *Burlington/Carter* test.

92. The IHO also found that Parents satisfied Prong III of the *Burlington/Carter* test. Specifically, he found that the Parents submitted the requisite 10 day notices for the 2012-13 and 2013-14 school years and the District failed to issue procedural safeguards to Parents, and that Parents' failure to provide formal written notice of their intention to place B.W. unilaterally at Kildonan for the 2011-12 school year was excused. IHO Op. at 78, 82.

93. Based on his finding that Parents had satisfied all three prongs of the Burlington/Carter test for the 2011-12, 2012-13 and 2013-14 school years, he ordered that the District reimburse Parents $78,000, based on the amounts they paid to Kildonan during those school years. IHO Op. at 79-80, 83.

94. The IHO further ordered $109,000 in retroactive direct tuition payment to Kildonan, based on the amount Kildonan advanced to Parents as conditional financial aid funds for those three school years. IHO Op. at 79, 84.

The SRO Decision

95. The District filed a petition to the State Review Officer for review of the IHO Decision on July 22, 2014.

96. In an opinion dated September 19, 2014, the SRO affirmed in part and reversed in part the IHO Decision. *See Application of the Bd. of Educ. of the Wallkill Centr. Sch. Dist*,, SRO No. 14-113 ("SRO Op."), attached as **Exhibit B.**

97. Although permitted to do so under State of New York regulations, the SRO neither requested nor admitted any additional evidence.

98. The SRO held that the IHO had correctly determined that the District failed to provide B.W. with FAPE for the 2011-12, 2012-13, and 2013-14 school years. SRO Op. at 15, 24, 28.

99. The SRO further agreed with the IHO that Parents had satisfied Prongs II and III of the Burlington/Carter test for the 2011-12 school year. SRO Op. at 19-20. Based on this finding, the SRO affirmed the portion of the IHO Decision awarding Parents full reimbursement for tuition at Kildonan for the 2011-12 school year. SRO Op. at 32.

100. With respect to the 2012-13 and 2013-14 school years, the SRO found that Parents had not satisfied Prong II of the *Burlington/Carter* test. SRO Op. at 25-26, 28-30. Consequently, the SRO reversed the IHO's award of tuition reimbursement for the 2012-13 and 2013-14 school years. SRO. Op. at 32.

COUNT I
VIOLATION OF THE IDEA AND NY EDUCATION LAW
PENDENT PLACEMENT

101. Plaintiffs reallege the previous allegations as if alleged herein in full.

102. The IDEA provides, in pertinent part:

> [D]uring the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement. 34 C.F.R. §300.518(a).

103. The IDEA holds the District responsible for tuition at the student's pendent placement "until a new placement is established by either an actual agreement between the parents and the District, or by an administrative decision upholding the District's proposed placement which [Parents] choose not to appeal, or by a court...." *Bd.*

of Educ., v. Schutz, 290 F. 3d 476, 484 (2d Cir. 2002), *cert. denied*, 537 U.S. 1227, 123 S. Ct. 1284, 154 L. Ed. 2d 1088 (2003).

104. There has been no agreement between the parties on a pendent placement, or decision of an administrative agency determining that the District's proposed placement can afford B.W. a FAPE.

105. Both the IHO and the SRO held that the District's proposed placements for the 2011-12, 2012-13 and 2013-14 school years would *not* afford B.W. with a FAPE.

106. Kildonan is therefore B.W.'s "current educational placement," as the decisions of both the IHO and SRO found that Kildonan was an appropriate placement for the 2011-12 school year.

107. Wherefore, the District is responsible to pay B.W.'s tuition at Kildonan, his current educational placement, from the date of the IHO decision and for the pendency of this litigation.

108. This is a statutory, non-discretionary and automatic entitlement which the District is legally responsible to provide.

COUNT II
VIOLATION OF THE IDEA AND NY EDUCATION LAW

109. Plaintiffs reallege the previous allegations as if alleged herein in full.

110. B.W. is a qualified individual with a disability under IDEA.

111. Defendants violated the IDEA and Article 89 of the New York State Education Law (N.Y. Educ. Law §§ 4402).

112. In this appeal, which is in the nature of a modified *de novo* review, this Court should independently review the record. Any questions of law and mixed questions of law and fact are subject to a pure *de novo* review standard.

113. The SRO erred in finding that Plaintiffs did not satisfy Prong II of the *Burlington/Carter* test for 2012-13 and 2013-14.

114. The SRO erred by failing to consider the totality of the circumstances—as the IHO properly did in his Decision—and relying too heavily on one factor, in finding that Kildonan was not an appropriate placement for the 2012-13 and 2013-14 school years.

115. The SRO erred by requiring that Parents' placement for the 2012-13 and 2013-14 school years be perfect, rather than reasonably calculated to enable B.W. to receive educational benefits.

116. Parents' decision to place B.W. at Kildonan for the 2012-13 school year was based on the evidence before them at the time of their decision, which was in the spring of 2012. The SRO erred in requiring Parents to disregard the contemporaneous evidence and contemporaneous opinions of professionals and school personnel that 1) B.W. had made significant behavioral progress during the 2011-12 school year at Kildonan and 2) he had been responding positively to the Orton Gillingham method of instruction.

117. The SRO also erred in finding, contrary to the IHO, that B.W. did not make progress at Kildonan with respect to behavior during the 2012-13 school year.

118. This inference is not well-reasoned or supported in the record.

119. To the contrary, the IHO found—in a better-reasoned opinion that cites ample testimonial and documentary evidence—that B.W. made substantial behavioral progress at Kildonan during the 2012-13 school year.

120. Parents' decision to place B.W. at Kildonan for the 2013-14 school year was based on the evidence before them at the time of their decision, which was in the spring of 2013. The SRO erred in requiring Parents to disregard the contemporaneous evidence and contemporaneous opinions of professionals and school personnel that 1) B.W. had made significant behavioral progress during the 2012-13 school year at Kildonan and 2) he had been responding positively to the Orton Gillingham method of instruction.

121. The SRO also erred in finding, contrary to the IHO, that B.W. did not make progress at Kildonan with respect to behavior during the 2013-14 school year.

122. This inference is not well-reasoned or supported in the record.

123. To the contrary, the IHO found—in a better-reasoned opinion that cites ample testimonial and documentary evidence—that 1) B.W. made substantial behavioral progress at Kildonan during the 2013-14 school year and 2) he had been responding positively to the Orton Gillingham method of instruction.

124. The SRO's Decision is erroneous, misconstrues the record and applicable review standards, and is contrary to law and statute.

COUNT III
VIOLATION OF SECTION 504 OF THE REHABILITATION ACT

125. Plaintiffs reallege the foregoing allegations as if alleged herein in full.

126. B.W. is a qualified individual with a disability under § 504.

127. Section 504 of the Rehabilitation Act provides that, "No otherwise qualified individual with a disability in the United States…shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be

subjected to discrimination under any program or activity receiving Federal financial assistance…" 29 U.S.C. § 794.

128. By the acts and failures of District employees, the District excluded B.W. from participation in and/or denied him the benefits of the services, programs and/or activities of the District. Both the IHO and the SRO held that the District failed to offer B.W. a placement that would provide him a FAPE for the 2011-12, 2012-13, or 2013-14 school years.

129. Such exclusion and/or denial were solely by reason of B.W.'s disability and were in violation of Section 504.

COUNT IV

VIOLATION OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT

130. Plaintiffs reallege the foregoing as if alleged herein in full.

131. B.W. is a qualified individual with a disability under Title II of the ADA.

132. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132

133. By the acts and failures of District employees, the District excluded B.W. from participation in and/or denied him the benefits of the services, programs and /or activities of the District. Both the IHO and the SRO held that the District failed to offer B.W. a placement that would provide him a FAPE for the 2011-12, 2012-13, or 2013-14 school years.

134. Such exclusion and/or denial were by reason of B.W.'s disability and were in violation of Title II of the ADA.

RELIEF REQUESTED

WHEREFORE, Plaintiffs A.W. and N.W. respectfully request that the Court:

1. Assume jurisdiction over this action;

2. Find that Kildonan is B.W.'s current educational and pendent placement;

3. Order the District to pay B.W.'s tuition at Kildonan during the pendency of this litigation, commencing no later than June 20, 2014, the date of the IHO decision (affirmed in part by the September 19, 2014 SRO decision) in which Kildonan was found to be an appropriate placement for the 2011-12 school year;

4. Accept additional evidence at the request of plaintiff pursuant to 20 U.S.C. §1415(i)(2)(C)(ii);

5. Conduct an independent review of the administrative record and any additional evidence;

6. Annul the decision of the SRO to the extent that it found that the Kildonan School was not an appropriate placement for B.W. for the 2012-13 and 2013-14 school years;

7. Enter a judgment finding that:

    a. The District failed to offer B.W. a FAPE for the 2011-12, 2012-13, and 2013-14 school years under the IDEA, § 504, Title II of the ADA and Article 89 of the New York State Education Law;

    b. The Kildonan School was an appropriate placement for B.W. for the 2011-12, 2012-13 and 2013-14 school years;

    c. Equitable considerations support an award of reimbursement and retroactive direct tuition payment for B.W.'s placement at the Kildonan School for the 2011-12, 2012-13 and 2013-14 school years; and

    d. Declare that Plaintiffs are "prevailing parties" under the IDEA, ADA, §504 and Article 89 of the New York State Education Law;

8. Issue an order directing the District to reimburse Parents for tuition and related expenses for the 2011-12, 2012-13, and 2013-14 school years and make a direct retroactive payment to Kildonan for B.W.'s tuition for the 2011-12, 2012-13 and 2013-14 school years, including pre-judgment and post-judgment interest on such awards;

9. Grant Plaintiffs an award of punitive damages against the DOE, plus pre-judgment and post-judgment interest on such award;

10. Award Plaintiffs reasonable attorney's fees and costs pursuant to 20 U.S.C. §1415(i)(3)(B)(i)(I), 29 U.S.C. § 794(a)(2), 42 U.S.C. § 12131 *et seq*., and 42 U.S.C. §1988; and

11. Grant such other and further relief as the Court deems just and proper.

Dated: December 29, 2014
White Plains, New York

/s/ Gina M. DeCrescenzo, Esq. Bar Roll # 519078 **GINA DECRESCENZO, P.C.** 180 South Broadway, Suite 302 White Plains, NY 10605 P: 914.615.9177 F: 914.615.9176 gina@decrescenzolaw.com	/s/ Benjamin J. Hinerfeld, Esq. Bar Roll #519063 **LAW OFFICE OF BENJAMIN J. HINERFELD** 2 Penn Center, Suite 1020 Philadelphia, PA, 19102 P. 215.575.0495 F. 215.475.4716 ben@hinerfeldlaw.com

Co-Counsel for Petitioners